IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 37

TOM TUNSTALL,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE No. 76, PORT NORFOLK LODGE No. 775, W. M. MUNDEN and NORFOLK SOUTHERN RAILWAY COMPANY.

BRIEF FOR NORFOLK SOUTHERN RAILWAY COMPANY

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THE RELIANCE PRESS OF NORFOLK, VA., INC.

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No brief has been filed on behalf of Tom Tunstall, petitioner, and the time for filing the same has apparently passed, so we work upon this present brief without a brief on behalf of Tunstall before us and in the face of Section 7 of Rule 27, of this Court, which says that in default of the brief being filed by the petitioner, the Court may dismiss the cause, and we submit that this cause should be dismissed pursuant to that Rule.

However, not knowing what ruling the Court will make as to default in filing a brief for petitioner, we proceed to consider the case.

We submit that there is no jurisdiction in the Court for two reasons, namely:

1. Brotherhood of Locomotive Firemen and Enginemen, a necessary party, has never been brought before the Court.

2. There is no Federal question involved in the case.

Discussing these matters separately, we submit:

1. That the Brotherhood of Locomotive Firemen and Enginemen was not brought before the Court is shown by the fact that it never voluntarily appeared, and that the return of the Marshal expressly shows that it was not served with process, that return reading (Record 40):

"Returned not executed as to the Brotherhood of Locomotive Firemen and Enginemen, no representative in this District."

Proper objections were duly made on this score (R. 21, 27).

Rule 17(b) of the Rules of Civil Procedure provides that the capacity to sue or be sued shall be determined by the law of the State in which the District Court is held (with certain exceptions, not relevant here); and the law of Virginia is especially contained in Section 6058, Code of Virginia, 1919, Section 6058

of Michie's Code of Virginia, of 1942, which was in full force during the whole course of this case, and which reads:

"§6058. Suits by and against unincorporated associations or orders.—All unincorporated associations or orders may sue and be sued under the name by which they are commonly known and called, or under which they do business, and judgment and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated. Process against such association or order may be served on any officer or trustee of such association or order."

Service can be made only as authorized by that statute, and service upon mere agent, or upon an officer of a subordinate lodge or order is not sufficient. *International Brotherhood of Boiler Makers v. Wood*, 162 Va. 517, 527, 528.

To meet this situation, Tunstall relies upon Rule 23 of Rules of Civil Procedure, which reads:

"Rule 23. Class Actions.

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action;

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

We submit that this rule does not apply at all. This Brotherhood was subject to suit as a single unit under the Virginia Statute just quoted, Virginia Code §6058.

2. There is no Federal question involved in the case.

Umstall claims that his rights of seniority under contract with Norfolk Southern Railway Company have been violated.

No Federal question is made by that claim. His additional averments that the Brotherhood has not properly represented him and the whole craft in bargaining makes no Federal question.

As said in the opinion of the District Court in the instant case (R. 36):

"As already noted, the Railway Labor Act of 1934 provides for the members of a craft or class of an interstate railway to select a bargaining agent to

represent that craft or class for the purpose of collective bargaining, and requires the Railway to recognize and treat with the agent so selected, *Virginian Railway Company v. System Federation No. 40, etc.*, 300 U. S. 515, affirming *Fourth Cir.*, 84 *Fed. 2d.*, 641, and the Railway can treat only with the agent selected by the craft or class, *Atlantic Coast Line R. Co. v. Pope, Fourth Cir.*, 119 *Fed. 2d*, 39. However, we search the Railway Labor Act in vain for any provision affording protection to the minority against wrongful, arbitrary or oppressive action of the majority through the bargaining agent which the majority has selected. The Act is silent in that respect. It stops short after providing for the selection of the bargaining agent and imposing upon the Railway the duty to treat with that agent alone after he is selected. Numerous authorities were cited and quoted in the arguments, among them *Teague v. Brotherhood of Locomotive Firemen and Enginemen, 6th Cir.* (1942), 127 *Fed. 2d*, 53. After a study of that decision, the Court has concluded that it is directly in point in the instant case, and in *Barnhart v. Western Maryland Ry Co., 4th Cir.*, 128 *Fed. 2d*, 709, 714, our Circuit Court of Appeals, after discussing and reviewing the authorities generally as to when a Federal question is presented, referred to and quoted the Teague case, as follows:

> "Quite in point here is the very recent case of Teague v. Brotherhood of Locomotive Firemen and Enginemen, 6 Cir. 127 F. 2d, 53, decided April 9, 1942. That was an action by a railway firemen against the Brotherhood (which was designated as collective bargaining agent of his class under the

Railway Labor Act) and the Railroad, to set aside a collective bargaining agreement on the ground that this agreement was destructive of his vested rights of seniority preference. In the unanimous opinion of the Court, holding that the action did not arise under a federal law, Circuit Judge Simons, 127 F. 2d, 53, 56, said:

"Reverting to the appellant's own statement of his case, such rights as are here claimed arise from individual contracts of the Negro firemen with the defendant Railroad. The appellant is unable to point to provision of the Railway Labor Act which protects such rights, or permits their invasion. The provisions of Sec. 2, subd. eighth makes the terms of the collective-bargaining agreement a part of the contract of employment between the carrier and each employee—the case, nevertheless, remains one based upon a contract between private parties cognizable, if at all, under state law."

"It is apparent in the light of these authorities that no Federal question is presented in the present case, and there being a lack of diversity of citizenship between the plaintiff and defendants, it follows that the motion to dismiss will have to be sustained."

And in affirming the District Court, the Circuit Court of Appeals for the Fourth Circuit collected many cases, and expressed the situation quite clearly, as follows (R. 43):

"There is no allegation of diversity of citizenship and jurisdiction of the suit can be maintained only

on the ground that the controversy is one arising under the laws of the United States. In so far as the suit is grounded on wrongful acts of the defendants, it cannot be said to be one arising under the laws of the United States, even though the union was chosen as bargaining representative pursuant to such laws. *Barnhart v. Western Maryland Ry. Co.*, 4 Cir. 128 F. 2d 709; *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 6 Cir. 127 F. 2d 53. We have considered whether jurisdiction might not be sustained for the purpose of declaring the rights of plaintiff to the fair representation for the purposes of collective bargaining which is implicit in the provisions of the National Railway Labor Act. We think, however, that recent decisions of the Supreme Court hold conclusively that there is no jurisdiction in the federal courts to afford relief under the act except where express provisions of the act so indicate. *Brotherhood of Ry. & S. S. Clerks, etc. v. United Transport Service Employees of America* (decided Dec. 6, 1943), U. S. ....; *Switchmen's Union of North America, etc. v. National Mediation Board et al.* (decided Nov. 22, 1943) .... U. S. ...., 64 S. Ct. 95; *General Committee, etc. v. Southern Pac. Co.* (decided Nov. 22, 1943), ... U. S. ...., 64 S. Ct. 142; *General Committee, etc. v. Missouri-Kansas-Texas Railroad Co. et al.* (decided Nov. 22, 1943, ... U. S. ...., 64 S. Ct. 146. In the case last cited, the Supreme Court, after commenting upon various provisions of the act and the machinery provided for their enforcement, said:

"The new administrative machinery plus the statutory commands and prohibitions marked a great

advance in supplementing negotiation and self-help with specific legal sanctions in enforcement of the Congressional policy.

"'But it is apparent on the face of the Act that while Congress dealt with this subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. It entrusted large segments of this field to the voluntary processes of conciliation, mediation, and arbitration. Thus by Sec. 5, First Congress provided that either party to a dispute might invoke the services of the Mediation Board in a 'dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference' and any other 'dispute not referable to the Adjustment Board and 'not adjusted in conference between the parties or where conferences are refused.' Beyond the mediation machinery furnished by the Board lies arbitration. Sec. 5, First and Third, Sec. 7. In case both fail there is the Emergency Board which may be established by the President under Sec. 10. In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems

has made it hesitant to go too fast or too far. *The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.*" (Italics supplied).

That the Fifth Amendment to the Constitution of the United States relates to Government action only, and not to action by private persons, and has nothing to do with the instant case, seems too clear to call for argument or citation of authority.

We respectfully submit that the case should be dismissed.

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